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No. 03-153

IN THE

Supreme Court of the United States

DISCOVERY HOUSE, INC.,
Petitioner,

v.

CONSOLIDATED CITY OF INDIANAPOLIS and METROPOLITAN BOARD OF ZONING APPEALS OF MARION COUNTY, INDIANA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 provide a private, for-profit corporation operating a methadone clinic with standing to sue for lost profits after the corporation received an adverse zoning decision denying it the opportunity to open at its preferred location.

2. Whether the court of appeals properly reversed a jury verdict under Fed. R. Civ. P. 50(a)(1) where no evidence existed that a majority of members of an adjudicative body harbored discriminatory animus and the only evidence of such animus must be imputed to the adjudicators based upon witness testimony.

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REASONS FOR DENYING THE WRIT

The Seventh Circuit's narrowly focused holding does not conflict with decisions from this Court or the federal courts of appeal. No other court has specifically reached the issue upon which the Seventh Circuit based its decision to reverse the jury's verdict on Petitioner's claims, *i.e.* that Section 504 of the Rehabilitation Act and Section 202 of the Americans with Disabilities Act do not confer standing to a corporation to obtain damages in the form of lost profits. Therefore, this Court should deny Discovery House's request for a writ of certiorari.

Additionally, Discovery House's petition raises no substantial questions warranting this Court's review because this Court's decision last term in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation* precludes relief as to all of Discovery House's claims. The Seventh Circuit did not reverse the jury's verdict that Respondents violated the Equal Protection Clause because of Discovery House's lack of standing. Instead, the court reversed the verdict as to that claim because Petitioner's only evidence of discrimination was the discriminatory animus displayed by private individuals testifying before the board of zoning appeals. In *Cuyahoga Falls*, this Court rejected an argument that discriminatory animus should be imputed from private actors involved in a petition drive to the government itself. The Seventh Circuit's equal protection analysis, which is consistent with *Cuyahoga Falls*, provides an independent basis for reversing the jury's decision, and raises no question of substantial legal significance warranting review by this Court.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PREVIOUS DECISIONS AND DOES NOT CONFLICT WITH OTHER DECISIONS FROM THE COURTS OF APPEAL.

A. The Seventh Circuit's decision is consistent with this Court's previous opinions on standing.

Discovery House asks this Court to review an issue not in dispute—whether the Rehabilitation Act, 29 U.S.C. §§ 794, 794a, and the Americans with Disabilities Act, 42 U.S.C. §§ 12132, 12133, permit the recovery of compensatory damages. Those statutes do provide such a remedy. The Seventh Circuit acknowledged as much and cited *Hills v. Gautreaux*, 425 U.S. 284 (1976) and *Franklin v. Gwinnett*

County Pub. Sch., 503 U.S. 60 (1992) in support. (Pet. App. at 6a.) For that reason, this Court should deny Discovery House's petition.

The issue the Seventh Circuit actually decided is whether Discovery House, a for-profit corporation that does not itself claim to be disabled, has standing under the ADA and Rehabilitation Act to recover a specific type of compensatory damages--lost profits—resulting from its association with disabled persons. Even if Discovery House sought review of that question, a review by this Court is unnecessary because the Seventh Circuit's ruling is consistent with this Court's existing decisions, and no conflict exists among the courts of appeal.

In *Friends of the Earth, Inc. v. Laidlow Envtl. Serv. (TOC), Inc.*, this Court reiterated the basic principle that a plaintiff must "demonstrate standing separately for each form of relief sought." 528 U.S. 167, 185 (2000). Consistent with this principle, the Seventh Circuit correctly focused on whether Sections 504 and 202 provided for relief in the form of lost profits, not whether compensatory damages are available generally.[1]

The Seventh Circuit correctly determined that permitting a private corporation to collect for projected lost profits would not benefit the disabled. Benefiting the actual victims of discrimination is an important purpose of the ADA and the Rehabilitation Act:

> [T]he remedies we may find (other than those specifically set out in the statute) must, at the very least, be those which directly benefit the disabled. It would

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[1] Respondents raised standing both before the district court and the Seventh Circuit. Specifically, Respondents argued below that Discovery House's failure to meet its obligation to present sufficient evidence of a relationship with persons with legally cognizable disabilities deprives it of standing in this case. (*See* Pet. App. at 54a-59a.)

> stretch the principle of *Bell v. Hood* [327 U.S. 678 (1946)] too far to find that Discovery House has standing to recover lost profits under these statutes.

(Pet. App. at 6a.)

The court's analysis, which first reviewed the remedy provisions of the ADA and Rehabilitation Act, is consistent with the text of these statutes and this Court's existing precedent. Titles I and III of the ADA explicitly provide protection for entities and individuals with known relationships to qualified individuals with disabilities. 42 U.S.C. §§ 12112 (Title I) and 12182 (Title III).[2] In contrast, Title II, the section upon which Discovery House relies, provides no explicit recognition of associational standing. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

B. The Seventh Circuit's decision does not conflict with decisions from the other circuits.

Discovery House relies on decisions from other jurisdictions, such as *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2nd Cir. 1997), *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999), and *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002), which do not address the question the Seventh Circuit decided here. Because no split among the circuits exists, review by this Court is unwarranted.

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[2] The RHA contains a similar provision that extends remedies to "any person aggrieved" by discrimination on the basis of disability. § 794a(a)(2).

Both *Innovative Health* and *Bay Area Addiction* addressed claims for injunctive relief only, and Respondents do not challenge before this Court Discovery House's ability to obtain injunctive relief. In *MX Group* the Sixth Circuit affirmed the district court's allowance of damages, but neither the Sixth Circuit nor the district court's opinion indicates either the type or amount of damages sought or the amount ultimately awarded. Because there is no split among the courts of appeal regarding the availability under the ADA and Rehabilitation Act of damages in the form of lost profits, this Court should deny the writ.

II. THE SEVENTH CIRCUIT PROPERLY REVERSED THE JURY'S VERDICT BECAUSE NO PROBATIVE EVIDENCE EXISTS THAT A MAJORITY OF MEMBERS OF THE BZA HARBORED DISCRIMINATORY ANIMUS.

Discovery House failed to cite in its petition this Court's decision last term in *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, ___ U.S. ___, 123 S.Ct. 1389 (2003). In that case, this Court rejected an argument that discriminatory animus should be imputed from private actors involved in a petition drive to the government itself. The Seventh Circuit's equal protection analysis, which is consistent with *Cuyahoga Falls*, provides an independent basis for reversing the jury's decision. Because Discovery House raises no other question of substantial legal significance warranting review by this Court, the writ should be denied.

A. The Seventh Circuit's decision is consistent with this Court's decision in *City of Cuyahoga Falls.*

Evidence of intentional discrimination on the part of government decision-makers is required to sustain damage judgments in cases involving the ADA, Rehabilitation Act and Section 1983. *Washington v. Davis*, 426 U.S. 229

(1976); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); 42 U.S.C. § 1981a(a); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). Thus, each of the three legal theories on which Discovery House's claims rests requires a finding of intentional discrimination.

Petitioner's argument that the court inappropriately re-weighed evidence demonstrates that it misunderstands the court's reasons for reversing the verdict. The court correctly found that the judgment could not be sustained because the evidence relied upon by Discovery House to prove intentional discrimination came from the testimony of witnesses before the BZA and not from the decision-makers themselves.[3]

> While [discriminatory intent] may be a possible conclusion, in the speculative sense, the evidence falls far short of proving the point. While several persons who testified against the proposed clinic at the hearing before the BZA might have been motivated by discriminatory intent, there is a paucity of evidence to show that the board itself, or its individual members, were. The motivations of witnesses cannot be held against decisionmakers.

(Pet. App. at 11a.)

The Seventh Circuit's conclusion that witness testimony cannot be imputed to decision-makers is supported both by *Village of Arlington Heights* and this Court's recent decision in *Cuyahoga Falls*. Conspicuously absent in this case is any evidence of a historical background or departure from procedure that would meet the tests for imputation of improper motive under *Arlington Heights*. On the contrary, the evidence shows both that City planners in this case

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[3] While the panel addressed the lack of discriminatory intent in the context of the Section 1983 claim, its analysis applies with equal force to the ADA and Rehabilitation Act claims.

favored Discovery House and that other methadone treatment centers have been open in Indianapolis for some time (including a treatment center owned by the City's public hospital system). (Pet. App. at 10a.)

Discovery House resorted to the kind of evidence to prove its case expressly rejected by this Court in *Cuyahoga Falls*. In that case, this Court held that statements made by private individuals during the course of a citizen-organized petition drive do not constitute state action for purposes of the Fourteenth Amendment. The motives of these persons could not be attributed to the city simply because it made the referendum process available for citizens to express their views and seek political change. *Cuyahoga Falls*, 123 S.Ct. at 1395.[4]

Relying on one of its earlier decisions, the Seventh Circuit described the problem of imputing discriminatory motive to an adjudicative body, in that case a prison disciplinary board required to hear charges of prisoner misconduct:

> Listening to a point of view does not constitute bias. If it did, judges could not listen to witnesses or lawyers who represent adversarial positions, and they probably could not consult with the authors of presentence reports or read articles in law reviews, for both presentence-report writers and professors may have axes to grind.

White v. Indiana Parole Bd., 266 F.3d 759, 767 (7th Cir. 2001).[5]

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[4] Similar to the government in Cuyahoga Falls, Respondents must permit citizens to participate in the zoning process including public testimony. *Robertson v. Board of Zoning Appeals*, 699 N.E.2d 310 (Ind. Ct. App. 1998).

[5] Even a claim by Discovery House that one or two of the BZA members arguably displayed bias against it would not have been sufficient to take the case to a jury because in order to prevail, Discovery House had the burden of proving that at least a majority of the BZA members

Here, the only evidence of animus was on the part of persons who testified in front of the BZA, and the members all denied having been swayed by testimony at the public hearing that the BZA was required by state statute to hold. Thus, given this Court's decision in *Cuyahoga Falls*, Discovery House presents no substantial question of law

B. The Seventh Circuit's decision to reverse the jury's verdict under Fed. R. Civ. P. 50 is consistent with the text of the rule and this Court's existing precedent.

Under Fed. R. Civ. P. 50, a court should render judgment as a matter of law so long as a party "has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." This Court's recent decision in *Reeves v. Sanderson Plumbing Products* removed and lingering doubt about what standard a court should apply in deciding a Rule 50 motion. 530 U.S. 133 (2000). When confronting a Rule 50 motion, a court "should review all of the evidence in the record." *Id.* at 150.

Because the standard of review is clearly established both by Rule 50 and *Reeves*, Discovery House contends that the Seventh Circuit's decision was error because it misapplied that standard.[6] Discovery House claims that the Seventh Circuit re-weighed the facts contrary to Rule 50.

Although whether intentional discrimination exists is generally a question of fact, as addressed in Part II A, *supra*,

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harbored discriminatory intent. *See, e.g., Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002) (quoting *Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001) (no municipal liability unless all three members of the council share illegal motive)).

[6] Misapplication of a properly stated rule of law, of course, rarely warrants the exercise of this Court's review power. Sup. Ct. R. 10.

the Seventh Circuit properly overturned the jury's verdict here because Discovery House produced no evidence of intentional discrimination. As the court of appeals explained, while illegal discrimination was a "possible conclusion, in a speculative sense" based upon the testimony of several witnesses, speculation without admissible evidence does not create an issue of fact necessitating a trial. (Pet. App. at 11a.)

Without evidence of discrimination, Discovery House merely raises editorial criticisms with the decision by complaining that the Seventh Circuit must have been wrong since it did not specifically restate the standard under Fed. R. Civ. P. 50 or cite to those cases that caution appellate courts about ordering judgments as a matter of law. (Pet. at 16.) "This Court, however, reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Discovery House should consider that it is this Court's "duty to look beyond the broad sweep of the language and determine. . .precisely the ground on which the judgment rests." *Id.* Because the court of appeals correctly concluded that subtracting the witness testimony from the discriminatory intent equation left Discovery House with no evidence of intent at all, this Court need not conduct any further review, and a petition for writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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